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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 340

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING

Thomas E. Bowman, Jr.
Bowman & Bowman
Attorneys for Appellant
30 South Third Street, Columbus, Ohio
43215

IN THE

Supreme Court of the United States

October Term, 1967

No. 840

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING

Appellant submits this petition for a rehearing of his appeal as presented in the Jurisdictional Statement filed with this Court, Appellees' opposing motions and Appellant's Reply Brief thereto on the following grounds:

1. By dismissing the instant case for want of a substantial federal question, the United States Supreme Court is affirming the Franklin County Ohio Court of Appeals and overruling the Supreme Court of California.

The Franklin County Ohio Court of Common Pleas, in paragraph 5 of its journal entry of October 25, 1963, found the "pay-patient" statutes constituting the subject matter of this appeal not in violation of either the Constitution of the State of Ohio or the Fourteenth Amendment to the Constitution of the United States. The Franklin County Ohio Court of Appeals in a most confusing pair of decisions dated April 26, 1966, and January 17, 1967, affirmed the Franklin County Ohio Common Pleas Court only as to the obligation of a parent for support of his minor child. However in its decisions the Ohio Court of Appeals incorporated by reference, as having been considered, *Department of Mental Hygiene of California vs. Evelyn Kirchner, Admx.*, with all of its decisions and ramifications. (36 Cal. Rptr. 488, 43 Cal Rptr. 329, or 400 P. Rptr. 2d 321, 380 U.S. 194) The California Supreme Court, in referring to that State's Constitution, Article I, Sections 11 and 21, stated:

> "These provisions of our State Constitution have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. While it is our view that we should reach the same conclusion under the Fourteenth Amendment we were, (and we are) in any event independently constrained to the result we reached by Sections 11 and 21, Article I of the California Constitution....."
> 400 P. Rptr. 2nd Series 322.

The California Court specifically overruled the line of cases prior to that time which had found the same distinction in the parent's liability for support of his minor child

that the Franklin County Ohio Court of Appeals espouses in its decisions. It is respectfully submitted that by incorporating *Kirchner*, the Ohio Court of Appeals has considered and cast aside the merits of the California Supreme Court ruling and effectively obliterated it. Despite the fact that a federal question was plainly raised in the initial stages of the instant appeal, in that the trial court spuriously endorsed the validity of the statutes which had been alleged as violative of the Fourteenth Amendment to the Federal Constitution, the Supreme Court of the United States reportedly has found no federal question of sufficient substance to entice its jurisdiction. However, as the Ohio Court of Appeals decision incorporates and by reference overrules the precedent of the California decision to the benefit of the forty-one State courts having comparable support statutes because of the federal question originally raised, the action of the United States Supreme Court so far has been to affirm the Franklin County Ohio Court of Appeals in its interpretation of the Fourteenth Amendment. It is respectfully submitted that this is an area reserved to the Federal Judiciary; for the irreparable harm and loss resulting from the consequences of the statutes under consideration will never be recovered in any of the forty-one states unless Appellant is justly afforded the relief sought herein.

2. Because of the failure of the Supreme Court of the United States to accept jurisdiction of this matter, the State of Ohio, emboldened by this Court's de facto endorsement of the "pay-patient" support program, is vigorously pursuing the issuing of capital improvement revenue bonds to be retired by taxes assessed against Appellant and other parents and liable relatives of mentally retarded persons.

The Director of the Department of Mental Hygiene & Correction of the State of Ohio has proposed to the State legislature that some 30 million dollars of revenue bonds be authorized for sale to be retired by the support payments of parents and liable relatives of the mentally retarded. The proceeds from these bonds would be for the capital improvements of all institutions in the State, regardless of whether or not the inmate for whose support the tax was assessed against the parent or liable relative could or was permitted to utilize same. Such a proposal creates so startling a possibility of violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as to create a general exodus from the State of Ohio. Only the inability of parents and liable relatives to withdraw the inmate whose incarceration generates the inequitable assessment, the validity of which we seek to have adjudicated by this Court, renders escape impossible for these unfortunate and helpless citizens.

3. As the Supreme Court of Ohio did not take jurisdiction of the appeal from the Franklin County Ohio Court of Appeals, and did not order that Court to certify its record, said record was certified from that inferior court to the United States Supreme Court. In deciding not to take jurisdiction of the instant appeal, the United States Supreme Court has opened the door for the separate states to tax the parents and liable relatives of juvenile criminals for the expense of their incarceration in state institutions.

On December 6, of 1967, a Lake County, Ohio, jury found Fred M. Esherick, Jr. guilty of first degree murder for slaying his father with a bayonet and did not recommend mercy. This 16 year old boy had also attempted to eliminate his mother, and had succeeded to the extent of putting both

parents in the trunk of an automobile and then rolling them into a flowing creek. As the controlling precedent and case law in the State of Ohio with regard to a parent's liability for the support of his minor child in a state institution stems from the Franklin County Ohio Court of Appeals decisions of April 26, 1966, and January 17, 1967, there is no barrier to deter the Department of Mental Hygiene and Correction of the State of Ohio from charging Fred's surviving parent for the trial costs, the incarceration and actual expenses of the execution of this minor defendant. Nor is it ridiculous to conclude that should this 16-year-old minor be found mentally deficient or retarded by psychiatric examination, and the possibility of such a determination would seem likely in view of the age of the child, he will be transferred to a state institution for the mentally retarded. Perhaps the same institution that housed Appellant Ward Miller's son; and the parents and liable relatives of the persons incarcerated there at the time of such transfer will be taxed for the cost of his maximum security, extra guards and such other care and treatment as he may require. Meanwhile, other minor inmates suffer the possibility of the same type of bayonet attack that overwhelmed this juvenile criminal's mother and father.

Even in California, the lack of a mandate from the Supreme Court of the United States has nurtured a veritable flood of cases brought by that State's Department of Mental Hygiene and Correction and County administrations in an attempt to reinstate the discriminating income producing support-collection procedures of the "pay-patient" statutes. (See 18 Hastings L.J. 720, (1967) Since *Kirchner*, it has been held in *County of Alameda vs. Espinosa* (243 A.C.A. 685, 52 Cal. Rptr. 480) that where "confinement for the dual purpose of protection of the public

at large and his reformation and rehabilitation . . . .," relatives, if otherwise liable, can be charged for the expense of his care. (243 A.C.A. at 700, 52 Cal. Rptr. at 489). How near such language draws to Fred M. Escherick, Jr.; especially if his sentence is commuted to life imprisonment, which would seem a justifiable alternative.

CONCLUSION

For these reasons, Appellant Ward Miller prays that the Supreme Court of the United States reconsider its decision and undertake a review of the interpretation of the Federal constitution determined by the Franklin County Ohio Court of Appeals. The matter is common to forty-two of the fifty States; and even when laid to rest by a State Supreme Court, it would seem that the decision of the United States Supreme Court alone can finally resolve the question.

Respectfully submitted,

FREEMAN T. EAGLESON, JR.
Attorney for Appellant
40 South Third Street
Columbus, Ohio 43215

CERTIFICATE OF COUNSEL

Attorney for Appellant hereby certifies that this petition for rehearing is filed in good faith and not for delay.

FREEMAN T. EAGLESON, JR.
Attorney for Appellant